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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

TRANSPORT WORKERS UNION LOCAL 200, Plaintiff and Appellant, v. SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY, Defendant and Respondent.	A123457 (San Francisco City and County Super. Ct. No. CPF-08-508236)

Transport Workers Union Local 200 (TWU) appeals from an order denying its petition to compel arbitration of a dispute with the San Francisco Municipal Transport Agency (MTA). We conclude that TWU waived its right to compel arbitration and therefore affirm the order for the reasons explained below.

I. BACKGROUND

TWU and MTA were parties to a collective bargaining agreement in effect from July 1, 2006 to June 30, 2007 (CBA).[1] The CBA specifies procedures for resolving grievances, which are defined broadly as "any dispute which involves the interpretation or application of, or compliance with this agreement . . . ." Arbitration is the fourth and final step of the grievance procedure, after submission of the grievance to different levels

[1] Collective bargaining agreements between unions and MTA are referred to in the record as "Memoranda of Understanding" or "MOUs."

of management. The CBA sets forth deadlines for moving grievances to the next steps, and for management responses. Paragraph 40 of the CBA, under the heading "Time Limits for MTA Service Critical Employees:" states in part: "If MTA fails to meet the time limits at any point in Steps 1and 2, the grievance shall be granted. If the Union fails to meet the time limits at Steps 1 and 2, the grievance will be withdrawn." CBA paragraph 42 states in part: "Any claim for monetary relief shall not extend more than thirty (30) days prior to the filing of a grievance." Paragraph 42 directs TWU to "file a grievance upon having knowledge of the aggrieved event, and should resolution outside the Grievance Procedure appear probable, request an abeyance of the Grievance Procedure time limits . . . ."

According to the declaration of Vicki Rambo, MTA's Director of Human Resources, in negotiations for the 2006-2007 fiscal year, MTA gave TWU and other unions "the option of either agreeing that: (1) represented employees would pay the 7.5% employee retirement contribution in exchange for a 7% increase in base wages; or (2) the MTA would pay the 7.5% employee retirement contribution, but employees would not receive any increase in base wages. TWU, like many unions, chose option (1) and swapped retirement contributions for wage increases. Other unions chose option (2)." Paragraph 136 of the CBA provided: "Effective July 1, 2006, represented employees who are members of SFERS [the San Francisco Employee Retirement System] shall receive a base wage increase of seven percent (7%) in exchange for their agreement to pay the seven and a half percent (7.5%) of the required employee retirement contribution amount to SFERS." CBA paragraph 280 likewise stated: "Effective July 1, 2006, represented employees who are members of SFERS agree to pay their own employee retirement contribution in an amount equal to seven and one-half percent (7.5%) of covered gross salary."

The parties negotiated from February to April 2007 over a new MOU to take effect July 1, 2007. The parties agreed that each could make up to 20 proposals. None of the 20 proposals advanced by TWU included any change in the payment of employee retirement contributions. Ms. Rambo states that, on April 11, 2007, after TWU agreed to

a second and final package proposal from MTA, TWU's negotiator said he "assumed that MTA would be paying, or 'picking up,' the 7.5% employee retirement contribution," an issue that had not previously been discussed.

During further negotiations on April 12, 2007, TWU argued that it was entitled to the 7.5 percent retirement contribution from MTA under paragraph 281 of the CBA, what it called a "me too" clause, that provided: "If it is determined through the voter process or through CITY action as a result of negotiations with any other Miscellaneous bargaining unit (as described by Charter section A8.409) to improve retirement benefits for other Miscellaneous employees, such improvements shall be extended to employees covered by this Agreement. The effective date for such improvements to Local 200's retirement benefits shall be the date such improvement[s] are ratified in the other Miscellaneous employees' collective bargaining agreement." Because MTA was picking up the retirement contributions for other unions—those that selected "option (2)," above, and did not receive the 7 percent raise—TWU believed that it was entitled under paragraph 281 to the same benefit. MTA argued that paragraph 281 did not apply because it covered retirement "benefits," rather than retirement "contributions."

Negotiations broke off on April 12, 2007, with TWU arguing that, apart from the retirement contribution issue, a deal had been reached on a new employment package, and MTA denying that any agreement had been reached on any part of a new package. TWU filed a grievance on that date (the First Grievance), charging MTA with failing to honor paragraph 281 in negotiations, and alleging that the paragraph required MTA to make TWU's 7.5% retirement contribution "beginning July 2007." MTA denied the grievance in a letter dated April 20, 2007, which stated among other things, "[w]e see no violation of paragraph 281," and advised that TWU could advance the grievance to the next step within 15 days.

On April 27, 2007, TWU wrote MTA a letter requesting resumption of negotiations, with the stipulation that "[t]he only outstanding issue on the table is the 7.5% retirement pick-up, as the Union has agreed to the MTA's wage proposal . . . ." MTA wrote back on April 30, stating that "the only issue is to confirm which of the two

MTA wage package offers the Union has accepted," and that "the union has an active grievance on [the 7.5 percent retirement pick-up] issue which will be resolved through that process." TWU replied in a letter that day: "Local 200 certainly does not accept your wage increase proposal without acknowledgement that the Union's members are entitled to the MTA paying for the 7.5% retirement pick-up pursuant to the 'me-too' clause agreed to by the parties. If it is MTA's position that Local 200 must now pay for the 7.5% retirement pick-up at the expiration of the current agreement and with the new agreement, Local 200 rejects the MTA's wage proposal."

The matter proceeded to interest arbitration under San Francisco City Charter, section A8.409-4, which provides for resolution by a three-member arbitration board consisting of a city representative, a union representative, and a neutral chairperson, of employment disputes that remain unresolved after good faith bargaining. TWU objected to the procedure, and filed an Unfair Practice Charge with the Public Employment Relations Board on May 4, 2007, alleging that San Francisco City Charter section A8.409-4 was an "unreasonable rule" within the meaning of the Meyers-Milias-Brown Act (Gov. Code, §§ 3500-3511; see Gov. Code, § 3507). The union made a special appearance in the interest arbitration and objected to the arbitration board's jurisdiction. The interest arbitration proceeded without TWU or its representative participating.

MTA filed a motion in the arbitration that TWU's demand for payment of the 7.5 percent retirement contribution be excluded as an issue because it was not among the proposals TWU advanced during bargaining.[2] Although the motion was granted, the arbitration board went on to consider the retirement contribution demand in deciding which side's position to adopt on the issue of wages. The board found that "when impasse was declared by the Union the only disputed issue on the table was wages, with the Union laboring under the impression (or misimpression, as the case may be or as the viewer sees it) that the MTA was going to revert back to [its pre-2006-2007 practice of]

[2] Ms. Rambo testified in the arbitration that she and her MTA negotiating team were "shocked" when TWU mentioned the retirement contribution issue "as a parting aside" at the end of the negotiations on April 11, 2007.

picking up the employee contribution to SF[E]RS, a demand never made by the Union at the table." MTA's proposal on the wage issue was to "increase wages for all classes in the unit by Two Percent (2%) effective April 5, 2008 and by an additional Three and Three-Quarter Percent (3.75%) effective April 4, 2009, with the MOU to terminate on June 30, 2009." TWU's proposal was identical to that of MTA , except that it included MTA's payment of the retirement contribution. The arbitration board approved the MTA proposal in a decision signed by the chairperson on May 23, 2007, and the MTA member on May 24, 2007.

TWU sent a letter to MTA on June 18, 2007, enclosing a new grievance on the retirement contribution issue. In the letter, TWU said it "agrees that there was no violation of the agreement for fiscal year 2006-2007 because the parties mutually agreed the Union would accept a 7% raise in exchange for the payment of the 7.5% retirement pickup for one year only." The new grievance (Second Grievance), dated June 19, 2007, was virtually identical to the First Grievance except that it alleged that MTA's failure to pay the retirement contribution violated paragraph 282, as well as 281, of the CBA.[3]

On June 29, 2007, MTA's Board of Directors approved a MOU with TWU for the period from July 1, 2007 to June 30, 2009, which, consistent with the result of the interest arbitration, repeated the language that had appeared in section 280 of the CBA obligating TWU members to make their own 7.5 percent retirement contributions.

On July 23, 2007, TWU wrote MTA a letter alleging that the Second Grievance had been granted under the terms of the CBA because MTA had not responded to it within 15 days as the CBA required. On August 13, 2007, MTA wrote back stating that

[3] Paragraph 282 provides: "The MTA Agrees to participate, on behalf of service critical employees at the Municipal Railway, in any City meet and confer process with TWU, Local 200 over a possible Charter amendment to enhance miscellaneous retirement benefits. As set forth in Charter Section A8.409-5, the parties acknowledge that this paragraph is not subject to Charter Section A8.409's impasse resolution procedures." TWU continues to argue on appeal that the Second Grievance requires an interpretation of paragraphs 281 and 282, but it is not clear how 282 supports the TWU's position on the retirement contribution issue.

because the Second Grievance was the same as the First Grievance, TWU did not advance the First Grievance, and the First Grievance was thereby withdrawn under the terms of the CBA, MTA "consider[ed] this matter closed." TWU lodged another grievance, dated August 20, 2007 (the Third Grievance), alleging that MTA had failed to respond timely to the Second Grievance.

MTA responded in a letter dated August 27, 2007, noting again that the First Grievance was deemed withdrawn under the CBA, and arguing that TWU "cannot avoid this result by simply refiling the same grievance." MTA was also "confused about the CBA upon which Local 200 seems to be relying. As we understand it, the Union is not objecting to any pay practices occurring between July 1, 2006 and June 30, 2007. The claim is that, as of July 1, 2007, MTA must pay both the increased base wages *and* the 7.5% retirement pick-up. That claim must be made under the 2007-09 CBA that was approved by the MTA Board of Directors on June 29, 2007." The letter went on to state that the First Grievance was "deemed withdrawn under the CBA. In addition, that grievance was premature and procedurally flawed in that it attempted to grieve a pay practice occurring under a superseding CBA and it failed to cite any provision of the current CBA. [¶] The [Second Grievance] on the same issue was also denied by the MTA as being nothing more than a restatement of the prior grievance. It too suffers from the same procedural flaws described above. Lastly, the [Third Grievance] regarding timelines is denied. It, too, suffers from the same substantive and procedural flaws described above. All three purported grievances are meritless in any case."

TWU wrote MTA two letters on September 25, 2007, one invoking arbitration of the Second Grievance, and the other invoking arbitration of the Third Grievance, under the CBA. MTA responded on October 2, 2007, reiterating objections to the Second and Third Grievances, but offering to "submit them together to a single arbitrator for resolution."

TWU replied on October 5, 2007, acknowledging that the First Grievance "was not pursued by the Union. Therefore, that grievance will not be arbitrated." TWU added, however, that "[n]othing prevents Management from introducing the [First Grievance] as

an exhibit into the arbitration on [the Second Grievance]," and said that it would agree to a "bifurcated arbitration" of the Second Grievance, with the first phase addressing whether, as TWU claimed, that grievance had been granted because of the timing of MTA's response to it.

MTA answered on October 15, 2007, stating that it would not agree to a bifurcated arbitration of the Second Grievance, but observing that TWU "can make this request to the arbitrator, once he or she is selected." MTA asked TWU to confirm that it was withdrawing the Third Grievance, since "[w]e do not want to arbitrate the [Second Grievance], only to face another grievance over the retirement pick-up . . . ." MTA reiterated its intention to argue that the Second Grievance was untenable given TWU's failure to pursue the First Grievance.

On October 23, 2007, TWU sent a letter to MTA asking MTA to obtain a list of arbitrators from the State Mediation and Conciliation Service. MTA replied in a November 1, 2007 letter, the last correspondence between the parties, requesting responses to the points raised in MTA's letter of October 15, 2007. TWU indicates that it did not respond to the letter because it believed that MTA was improperly attempting to impose conditions, outside the scope of the CBA, on arbitration of the Second Grievance.

TWU filed its petition to compel arbitration of the Second Grievance in April 2008. In its briefing in opposition to the petition, MTA asserted that TWU was "attempt[ing] to gain something no other City employee obtained—the City picking up the full 7.5% retirement contribution and a 7% raise."

The court denied the petition, explaining: "The [CBA] relied on by Petitioner was in effect during the 2006-2007 fiscal year . . . . Petitioner has stated unequivocally that 'there was no violation of the agreement for fiscal year 2006-2007.' The Court finds that the parties have a subsequent MOU governing the rights and obligations of the parties after the expiration to the 2006-2007 MOU. As the [Second Grievance] makes clear, Petitioner seeks to arbitrate a breach that allegedly occurred after the [CBA] ended. But Petitioner is not seeking to arbitrate the issue under the subsequent MOU. Rather, Petitioner seeks to arbitrate the dispute based on the [CBA], an agreement that Petitioner

admits has not been violated. It follows, therefore, that since the [CBA] relied upon by Petitioner admittedly has not been breached, there is no basis to compel arbitration. It would simply be an idle act. The Court also finds that there is a material question as to whether Petitioner waived arbitration of this claim given its failure to pursue [the First Grievance] and subsequent conduct."

II. DISCUSSION

Code of Civil Procedure section 1281.2 provides in pertinent part: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner . . . ." The motion to compel was thus properly denied if the parties did not agree to arbitrate the retirement contribution dispute, or TWA waived its right to compel arbitration of that dispute. We hold that the right to compel arbitration was waived, and therefore need not decide whether the dispute would otherwise have been arbitrable under the CBA.

We acknowledge that California has " '[a] strong policy favoring arbitration agreements and requires close judicial scrutiny of waiver claims.' " (*Wagner Construction Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 31 (*Wagner*).) " '[A]lthough . . . a waiver of arbitration is not to be lightly inferred [citation], our cases establish that no single test delineates the nature of the conduct of a party that will constitute such a waiver. . . .' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 983 (*Engalla*).) A waiver may be found if the moving party has failed to meet a contractual deadline for demanding arbitration (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 321 (*Platt*)), or taken actions that are inconsistent with the right to arbitrate (*Wagner, supra*, 41 Cal.4th at p. 31). Where, as here, the arbitration agreement is governed by California law, waiver of arbitration is an issue for the court rather than the arbitrator. (See *Engalla, supra*, 15 Cal.4th at p. 982; *Omar v. Ralphs Grocery Co.* (2004) 118 Cal.App.4th 955, 963.) Waiver is ordinarily a question of fact, and a trial

court's finding on the issue is reviewed only for substantial evidence. (*Engalla*, at p. 983.) The trial court here thought that waiver was a "material question," but made no finding on the point. Accordingly, we determine the question de novo.

The waiver issue boils down to whether TWU forfeited its right to arbitration of the Second Grievance by abandoning the First Grievance. We note in this regard that the two grievances were in substance identical. TWU argued below that the grievances were "entirely different" because while the First Grievance alleged only a violation of paragraph 281 of the CBA, the Second Grievance alleged violations of both paragraphs 281 and 282. (See fn. 3, *ante*.) However, TWU does not renew this argument on appeal and the argument lacks merit in any event. The grievances were essentially the same in that they both alleged that MTA violated the CBA by failing to accept responsibility for paying employee retirement contributions beginning in July 2007.

To secure case law support for their positions, the parties attempt to frame the waiver issue as one of timeliness. TWU's timeliness argument focuses on the Second Grievance. TWU maintains that the Second Grievance was timely filed under paragraph 42 of the CBA, which precludes claims for monetary relief that "extend more than thirty (30) days prior to the filing of a grievance." The Second Grievance was filed on June 19, 2007, within 30 days of May 24, 2007, the date on which the MTA member on the interest arbitration board signed the decision denying TWU's retirement contribution proposal, what TWU calls the "affirmative confirmation" that MTA would not be picking up the employee retirement contribution. TWU submits that the First Grievance "was not yet ripe" when it was filed on April 12, 2007, "because TWU did not learn that [MTA] had unequivocally decided not to honor the 'me too' clause until . . . May 24, 2007." There is no dispute that the Second Grievance, from the point of filing, was advanced to arbitration within the time limits provided in the CBA. Thus, as TWU characterizes it, this case does not concern a dispute about the timeliness of an arbitration demand, but rather about the timeliness of a grievance, which, under the holding of *Napa Association of Public Employees v. County of Napa* (1979) 98 Cal.App.3d 263, 270−271 (*Napa*), is a matter for the arbitrator, not the court, to determine.

MTA's timeliness argument focuses on the First Grievance. MTA observes that the First Grievance was not advanced to arbitration within the time specified in the CBA and was instead abandoned. Because TWU did not timely advance the First Grievance, MTA submits that TWU can be deemed to have waived its right to arbitrate under *Platt, supra,* 6 Cal.4th at page 321, which holds that "a contractual requirement that a party's demand for arbitration must be made within a certain time is a condition precedent to the right to arbitration. In the absence of a legal excuse or subsequent modification of the parties' agreement, the failure to submit the dispute to arbitration within the agreed time precludes judicial enforcement of the right to arbitrate."

We do not believe that timeliness is the crux of the waiver issue here, or that either the *Napa* or the *Platt* case is controlling. The waiver issue does not turn on whether the First or Second Grievance, considered individually, was prosecuted in a timely manner; the more fundamental question is whether TWU took an action inconsistent with its right to arbitrate the Second Grievance by abandoning the First Grievance. If, as TWU contends, its abandonment of the First Grievance did not preclude it from filing an identical Second Grievance, then it is immaterial whether, as MTA argues, the First Grievance was not timely advanced to arbitration. On the other hand, if, as MTA maintains, TWU forfeited its right to pursue the Second Grievance by abandoning the First Grievance, then it is irrelevant whether, as TWU contends, the Second Grievance was timely filed.

Neither side cites any cases involving renewal of abandoned grievances, but both have advanced policy arguments on the subject. TWU asks us to "imagine a scenario in which a union files a grievance, then believes that the issue can be informally resolved with management, and consequently withdraws the grievance. If the union in the above scenario subsequently learns that its early belief was in error, it should not be barred from submitting a new grievance." MTA argued below: "It would serve no purpose to permit a party to withdraw a grievance if it could simply be refiled over and over again. The obvious rule of expedience, public policy, and the desire for industrial relations tranquility would be severely undermined if TWU could continue to file seriatim

grievances indefinitely. To permit such abuse would leave the MTA at the mercy of TWU, forced to respond to the same grievance over and over and over again. TWU might opt for such a repetitive filing strategy just to wait until the moment that, exhausted by the same recurrent grievance, MTA failed to respond. . . ."

Whatever force these policy arguments may have in the abstract, they carry little weight in this case. TWU posits a scenario where a union believes that a grievance can be informally resolved with management, but MTA never gave TWU any reason to believe that it would accede to TWU's retirement contribution demand. MTA imagines being bombarded with repetitive grievances, but only one renewed grievance is at issue.

MTA contends and, in the final analysis, we agree, that the CBA itself prohibits the filing of multiple identical grievances. MTA refers to paragraph 40 of the CBA, which provides that a grievance not timely pursued is considered "withdrawn." MTA argues that "[t]he purpose behind this provision—to ensure expediency and finality of disputes—would be greatly undermined if TWU were allowed to file grievances, abandon them, and refile them again whenever it chooses." While paragraph 40 provides some support for MTA's position, we do not find it entirely dispositive because it does not indicate whether a withdrawn grievance can be refiled. The point MTA seeks to make would have been clearer if paragraph 40 had provided that a grievance not timely pursued was thereby "denied," rather than "withdrawn."

The CBA provisions that in our view untie the legal knot are those in paragraph 42, the paragraph on which TWU relies in arguing that the Second Grievance was timely. That paragraph provides in full: "Any claim for monetary relief shall not extend more than thirty (30) days prior to the filing of a grievance. Though the resolution of disputes outside the Grievance Procedure is desired, it is understood by Local 200 that, in order to preserve its claims for monetary relief, it will file a grievance upon having knowledge of the aggrieved event, and should resolution outside the Grievance Procedure appear probable, request an abeyance of the Grievance Procedure time limits, as set forth above. The MTA will not unreasonably refuse a request for abeyance where settlement of an economic claim appears probable."

Paragraph 42 provided a means of forestalling the prosecution of grievances that appeared likely to be resolved informally: a procedure for holding grievances in abeyance, which would be superfluous if TWU were free to drop grievances and then reassert them. The paragraph addressed TWU's concern that it not be required to pursue unnecessary grievances, and evidenced an intent to preclude the renewal of grievances under TWU's theory.

In this case, TWU filed the First Grievance upon learning that MTA disputed TWU's entitlement to payment of the employee retirement contribution under the "me too" paragraph of the CBA. If, as TWU says it believed, there was some likelihood of obtaining that payment through further negotiation, then TWA was required to request a tolling of the grievance procedure time limits as to the First Grievance as provided in paragraph 42. If informal resolution of the grievance was unlikely, TWU was obliged to prosecute the First Grievance to arbitration. However, TWU did neither. It simply abandoned the First Grievance, an act inconsistent with its right to arbitrate the dispute, and later asserted an identical Second Grievance, an act inconsistent with paragraph 42 of the CBA. We conclude that TWU thereby waived arbitration of the Second Grievance.[4]

III. DISPOSITION

The order denying the motion to compel arbitration is affirmed.

Marchiano, P.J.

We concur:

Dondero, J.
Banke, J.

[4] In view of this conclusion, we need not reach the parties' arguments on other issues such as the effect of the withdrawal of TWU's unfair practice charge in Public Employment Relations Board Case No. SF-CE-439-M, and the related settlement agreement.